FILE COPY.

Office Supreme Court U. S.
FILED
APR 9 1906
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 236.

THOMAS O'CONOR, PLAINTIFF IN ERROR,

v.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

ARGUMENT OPPOSING MOTION TO DISMISS.

H. G. DICKINSON,
Attorney for Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 21087

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 236.

THOMAS O'CONOR, PLAINTIFF IN ERROR,

v.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

ARGUMENT OPPOSING THE MOTION TO DISMISS.

I.

As a counter-proposition to the first proposition contained in said motion, the following is submitted, viz:

An action at law brought in her own court by one of the States of the United States as plaintiff against a non-resident alien as defendant is removable to the proper United States circuit court upon the filing by the defendant of the petition and bond required by law, and a judgment of the highest court of a State refusing the removal of such a cause is reviewable by this court on writ of error.

This counter-proposition is embraced in the first proposition in the brief of plaintiff in error filed herein, on page 5, and in addition to the authorities and argument submitted thereunder, on page 6 of said brief, I now cite the case of

Cohens *v.* Virginia, 6 Wheat., 285. This court in its opinion in that case used the following language, viz:

"The second section of the Constitution defines the extent of the judicial power of the United States: jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whatever may be the parties. This class comprehends all cases in law or equity arising under the Constitution, the laws of the United States and treaties made or which shall be made under their authority. This clause extends the jurisdiction of the court to all the cases described without making in its terms any exception whatever and without any regard to the condition of the party. If there is to be any exception, it is to be implied against the express words of the article. In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended controversies between two or more States, between a State and citizens of another State and between a State and foreign States, citizens or subjects.

"If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may be, *these parties have a constitutional right to come into the courts of the Union.*"

Section 12 of the judiciary act of 1789 and subdivision first of section 639 of the Revised Statutes of the United States provide for the removal of suits in State courts against aliens, and they have not been repealed or superseded by subsequent legislation (The State of Texas *v.* Lewis, 14 Fed. Rep., 65).

II.

COUNTER-PROPOSITION TO SECOND PROPOSITION IN MOTION TO DISMISS.

This court has jurisdiction to review the judgment in this case on writ of error because the plaintiff in error claimed the land in controversy under a grant from the government of Spain to Joaquin Galan, made in the year A. D. 1767,

or about that time, and prior to the year 1804, the said grant covering such land and being made at such time as to be within the protection guaranteed by the treaty of Guadalupe Hidalgo; and plaintiff in error connected his title with said grant by a regular chain of title, and none of the State courts which had this case under consideration found that plaintiff in error did not connect his title with said grant.

STATEMENT.

Plaintiff in error connected his title to that of Joaquin Galan under said grant by a regular chain of title (Trans., pp. 21, 22, 23). The judgments and opinions of none of the State courts decree or hold the contrary (Trans., pp. 11, 46 to 53, 67 to 70, and 80).

ARGUMENT.

Plaintiff in error claimed, first, that he held the title to the land in controversy by a regular chain of title commencing in a grant from the Spanish government to Joaquin Galan made about the year 1767; and further claimed, as evidence of his title, that said grant was recognized, ratified, and confirmed by the judgment of the district court of Webb county, Texas, of March 13, 1872. Second, he claimed that if said judgment of March 13, 1872, should be held void, then that said grant was recognized and confirmed by the judgment of the said district court of January 8, 1862, which shows that the land in controversy was granted by the government of Spain to the settlers of the town of Palafox about the year 1810, and that he, plaintiff in error, held the title of said settlers under said grant to them by the Spanish government.

It will thus be seen that this is a case where there was drawn in question a title claimed by plaintiff in error under a treaty of the United States, the treaty of Guadalupe Hidalgo, and also under two statutes of the United States, the same being the joint resolution of the Congress for

annexing Texas to the United States, approved March 1, 1845, and the joint resolution of the Congress for the admission of the State of Texas into the Union, approved December 29, 1845.

If this case is one in which there was drawn in question a title claimed under a treaty or the statutes of the United States, then the judgment of the supreme court of Texas is reviewable by this court. When is such a title drawn in question? In Owings *v.* Norwood's Lessee, 5 Cranch, 347, it was held by this court, first, that the 25th section of the judiciary act must be restrained by the Constitution, the words of which are "all cases arising under treaties;" second, that "the reason for inserting that clause in the Constitution was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals. It was to avoid the apprehension as well as the danger of State prejudices. *Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the States and whoever may have the right is protected,*" and, third, that this court has jurisdiction even if the treaty is drawn in question *incidentally*.

This doctrine is affirmed by this court in Smith *v.* State of Maryland, 6 Cranch, 286; Martin *v.* Hunter, 1 Wheat., 359; Henderson *v.* Tennessee, 10 How., 311. In all of these cases it will be seen that titles under treaties or titles protected by treaties were set up to prevent confiscation of the land involved. In the case at bar the State of Texas practically attempts to confiscate the land in controversy. In her petition filed in the trial court she claims to be the owner of the land, and that the same belongs to the common-school fund of the State. Under the constitution and laws of Texas only the unappropriated public lands belong to that fund. Therefore the State claims the land as unappropriated public land. Yet the only evidence she introduced, the judgment of the district court of Webb county of January, 1860, shows that this identical land was granted twice

by the former sovereignty of the soil—once about the year 1767 ~~1804~~, by grant to Joaquin Galan, and again, about the year 1810, by grant to the settlers of the town of Palafox; and there is not one scintilla of evidence in all the record to show that the State ever acquired the land after the grant to the settlers of Palafox. By authorizing and directing this suit by the act of her legislature of September 9, 1901, and by the judgment of her supreme court in this case, practically a confiscation of the land is attempted to be made, in violation not only of the treaty of Guadalupe Hidalgo, but also of one of the conditions upon which the State was admitted into the Union. By the joint resolution of Congress approved March 1, 1845, the Republic of Texas was admitted into the Union upon two conditions and guarantees: First, "that said State to be formed subject to the adjustment by this Government of all questions of boundary that may arise with other governments," and, second, "said State when admitted into the Union shall retain all the vacant and unappropriated lands lying within its limits to be applied to the payment of the debts and liabilities of said Republic of Texas and the residue of said lands after discharging said debts and liabilities to be disposed of as said State may direct."

The Republic of Texas accepted these conditions and guarantees, and it was only after such acceptance that she was admitted into the Union (joint resolution of Congress approved December 29, 1845; U. S. Statutes at Large, vol. 9, p. 108). By the acceptance of these conditions the State guaranteed to the United States Government and pledged herself that only the unappropriated land within the boundaries to be fixed by the United States and Mexico should be appropriated by her for any purpose. The plaintiff in error claims title to land within those very boundaries thus fixed, which land was appropriated by grant and by possession long before and at the time the Republic of Texas accepted these conditions; yet the State of Texas is seeking to appropriate this identical land. What tribunal should ultimately decide

whether the State in endeavoring to do this is violating her guaranty and obligations under the joint resolution of Congress above mentioned? The Constitution of the United States and the judiciary act furnish the only answer to this question, and that answer is, that "a final judgment in any suit in the highest court of a State where any title, right or privilege is claimed under the Constitution or any treaty or statute of the United States and the decision is against the title, privilege or immunity specially set up or claimed by either party under such Constitution, treaty or statute may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

In McKenney *v.* Saviego, 18 How., 240, this court held that the title therein set out was not protected by the treaty of Guadalupe Hidalgo, because the land in litigation was situated in the territory which the Republic of Texas had acquired long before the treaty was made. This last-mentioned decision is cited in Besse *v.* Brownsville, 154 U. S., 610, as authority for the statement that "the treaty of Guadalupe Hidalgo had no relation to property included in the State of Texas;" but an examination of the case of McKenney *v.* Saviego will show that it furnishes no authority for such a statement.

The courts of Texas have long held that the treaty of Guadalupe Hidalgo is applicable to the title to the lands in that territory of the State in which the land in controversy in this case it situated (The State *v.* Sais, 47 Tex. Rep., 309; Baldwin *v.* Goldfrank, 88 Tex. Rep., 883; Haynes *v.* State of Texas, 11 Tex. Reporter, 885; Tex. Mex. Ry. Co. *v.* Locke, 74 Tex. Rep., 370).

Besides, the State of Texas, by the acts of her legislature, approved respectively February 11, 1860, and September 9, 1901, recognized the treaty as applicable to lands in said territory, and that said treaty furnishes a rule of decision in reference to the titles of such lands.

In Tennessee *v.* Davis, 100 U. S., 264, this court defined

the cases which may be considered as arising under the Constitution and laws of the United States in the following language:

"A case arising under the Constitution and laws of the United States is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by law or treaty. A case consists of the right of one party as well as of the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the acts of Congress whether they constitute the *right* or *privilege* or *claim* or *protection* or *defense* of the party, in whole or in part by whom they are asserted."

In the case at bar the plaintiff in error interposes the acts of Congress and a treaty of the United States as a defense and protection against the practical confiscation of his property; and these acts and this treaty are parts of the supreme law of the land, of which all courts must take notice (Head Money cases, 112 U. S., 580; United States *v.* Rauscher, 119 U. S., 407; New Orleans *v.* de Armas, 9 Pet.).

The case at bar can be readily distinguished from the following cases: Crystal Springs Land and Water Co. *v.* Los Angeles, 82 Fed. Rep., 114; 177 U. S., 169; Phillips *v.* Mound City Ass'n, 124 U. S., 605; California Powder Works *v.* Davis, 151 U. S., 389; and New Orleans *v.* de Armas, 9 Pet.

In Crystal Springs L. & W. Co. *v.* Los Angeles both parties claimed under Mexican grants, confirmed and patented by the United States, and the only question at issue was whether or not the water percolating under the lands granted passed with the original grants thereof, and the determination of that question does not require the construction of any statute or treaty of the United States.

In Phillips *v.* Mound City Ass'n the land in controversy was granted by the Mexican government to three persons

who were partners, and the only question in the case was whether certain proceedings before a Mexican tribunal prior to the treaty of Guadalupe Hidalgo were sufficient to effect a partition of the land, the title to which had been confirmed by the Commissioners under the act of Congress of March 3, 1851. No construction of a treaty or act of Congress was required to determine this question, which could be decided only by the construction of the laws of Mexico applicable to the subject.

In California Powder Works *v.* Davis two parties claimed title to the same land, each under a Mexican grant made prior to the treaty of Guadalupe Hidalgo and each under a patent from the United States, and the only question in the case was whether one of the grants was or was not obtained by fraud, and the decision of that question depended upon facts not connected with any statute or treaty of the United States.

In New Orleans *v.* de Armas the city of New Orleans claimed the land in controversy as a part of the levee dedicated to the use of the city, and that its title was protected by the treaty ceding Louisiana to the United States. But the court held that under the peculiar terms of the treaty its stipulations ceased to operate in Louisiana after its admission into the Union; but that if any of the rights guaranteed by the treaty had been violated while the stipulations remained in force, then this court would have jurisdiction on writ of error.

It will be observed that in all of these cases above analyzed no real claim of title arising out of a treaty or the statutes of the United States was involved; no such title was drawn in question; no defense depended upon a treaty or statute, and the terms of no statute or treaty needed to be appealed to or construed to protect property rights from impairment or confiscation, as in the case at bar and as in all the cases under treaties of which this court has taken jurisdiction on writs of error to State courts.

III.

COUNTER-PROPOSITION TO THE FIFTH PROPOSITION IN MOTION TO DISMISS.

Plaintiff in error claimed as a defense to the suit of the State that his title to the land was ratified and confirmed by the judgment of the district court of Webb county of March 13, 1872, in the case of Daniel Ruggles *v.* The State of Texas, and that his title was further ratified and confirmed by the act of the legislature of the State of Texas, approved April 4, 1881. Said judgment and said act operated to vest the title in plaintiff in error and further operated as a contract between the State and him; and the effect of the passage and enforcement of the act of the legislature of Texas of September 3, 1901, under which this suit was brought, is to divest plaintiff in error of his vested right and title to said land, and to deprive him of his property without due process of law, contrary to the fifth amendment to the Constitution of the United States, and to impair the obligation of said contract created by said judgment and act, in violation of section 10 of article I of the Constitution of the United States; and the judgment of the supreme court of Texas holding said judgment void and holding that said act of April 4, 1881, did not vest title in plaintiff in error is reviewable by this court on writ of error (Grogan *v.* San Francisco, 18 Cal., 590; Fletcher *v.* Peck, 6 Cranch, 87).

It is respectfully submitted that the motion of defendant in error should be overruled and not granted.

H. G. DICKINSON,

Attorney for Thomas O'Conor, Plaintiff in Error.